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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

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MAS-MO

No. 629

FRANCESCO MASTRAPASQUA,
Petitioner,

vs.

EDWARD J. SHAUGHNESSY, District Director of Immigration and Naturalization,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT

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The petitioner, Francesco Mastrapasqua, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Second Circuit affirming an order of the District Court for the Southern District of New York discharging the writ of *habeas corpus* herein.

Opinions Below

On June 13, 1949, the District Court dismissed the writ of *habeas corpus* herein after filing a memorandum opinion dated June 7, 1949. On March 2, 1950, the Circuit Court of Appeals, Judges Augustus Hand, Chase and Frank presiding, reversed and remanded the cause in accordance with its opinion dated March 2, 1950. Judge Chase dissented in a separate opinion. These opinions are reported at 180 F. 2(d) 999. Thereafter the District Court again dismissed the writ of habeas corpus on November 4, 1950 and on appeal, with Judges Augustus Hand, Chase and Clark presiding, the Circuit Court affirmed the dismissal on February 15, 1951.

Jurisdiction

The judgment of the Court of Appeals was entered on February 15, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Whether an alien may be ordered deported and denied discretionary relief from deportation pursuant to an unpublished ruling of the Attorney General, issued prior to the law under which relief is sought (Public Law 863, 80th Congress, 62 Stat. 1206) and rendered in violation of the Attorney General's own regulations (8 C. F. R. 90.12) which require him to state his conclusions and reason for his decision whenever he reverses the Board of Immigration Appeals.

2. Whether a deportation order under the aforesaid circumstance violates the due process clause of the Fifth Amendment.

3. Whether the refusal to grant discretionary relief in the instant case under Public Law 863, 80th Congress (62

Stat. 1206) upon the basis of an opinion of the Attorney General which was issued prior to such statute and which gave no reason for his action constitutes a refusal to exercise discretion or an abuse of discretion reviewable by judicial action.

Statutes and Regulations

Title 8, U. S. Code, Section 155c as amended by 62 Stat. 1206 provides:

> "Sec. 155(c) *Deportation of undesirable aliens generally.* In the case of an alien (other than one to whom subsection (d) of this section is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act."

5 U.S.C.1009e provides:

> "(e) Scope of review. — So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an

abuse of discretion, or otherwise not in accordance with law; . . ."

8 C.F.R. 90.12 provided in part in 1946 as follows:

"In any case in which the Attorney General shall reverse the decision of the Board, . . . the Attorney General will state in writing his conclusions and the reasons for his decision."

8 C.F.R. 142.1 and 142.2 read as follows:

"Sec. 142.1 *Who may apply.* An alien who is a member of any of the following classes and who intends to apply to a consular officer of the United States in Canada for an immigration visa for entry into the United States for permanent residence may, subject to the provisions of this part, apply for the privilege of a preexamination by officers of the Immigration and Naturalization Service for the purpose of determining in advance his admissibility into the United States for permanent residence when in possession of an unexpired immigration visa:

(a) An alien—other than a citizen of Canada, Mexico, or any of the islands adjacent to the United States—who has been within the United States for a period of one year or more and who has a spouse, parent, or minor child, who is in the United States and is a citizen thereof or is a lawfully permanent resident alien;

(b) An alien—other than a citizen of Canada, Mexico, or any of the islands adjacent to the United States—who has resided in the United States for a period of five years or more; or

(c) An alien—other than a citizen of Canada—whose case is found to be an exceptionally meritorious case.

"Sec. 142.2 *Aliens eligible.* Preexamination shall not be authorized unless it appears to the officer granting such authorization that the alien is:

(a) Admissible to Canada;

(b) Of good moral character;

(c) Registered and/or fingerprinted as required by the Alien Registration Act, 1940; and

(d) Able to obtain the prompt issuance of an immigration visa in case it is determined that he is admissible to the United States for permanent residence."

Statement

The facts herein are fully set forth in the opinion of the Court of Appeals. 180 F. (2d) 999, 1004, 1005.

Petitioner is a citizen of Italy who has resided in the United States since his arrival at Boston, Massachusetts on June 7, 1940. The petitioner came to the United States as a seaman and following the entry of Italy into World War II respondent's vessel remained in port and he remained on board. On March 30, 1941, pursuant to a program to prevent possible destruction of Italian vessels the respondent was removed from his vessel by the Coast Guard and even though we had not yet entered the War, he was interned pursuant to a policy of the Attorney General. On March 31, 1941 a warrant of arrest in deportation was issued on the ground that after entry as a seaman, petitioner remained longer than permitted. During the War the respondent was interned at Fort Missoula, Montana along with other recently arrived Italian seamen and he was subsequently released in March of 1944. On December 12, 1947 the Board of Immigration Appeals directed that the petitioner leave the United States within 60 days. He failed to depart and thereafter his deportation was directed on the ground that he remained in the United States longer than permitted under the Immigration Act of 1924 (8 U.S.C.214). (It is questionable whether petitioner is deportable on this charge. He was not admitted to the United States under the Act of 1924, but rather was brought in involuntarily by the Coast Guard.)

In a decision dated October 1, 1948 and set forth in the Court of Appeals opinion, 180 Fed. 2d at 1004, the Board of Immigration Appeals refused to grant discretionary relief known as preexamination (8 C.F.R.142) which procedure would permit the petitioner to become a permanent resident of the United States, on the ground that the Attorney General had refused to legalize the status of an alien by the name of Lagomarsino, "a case involving a similar factual background in that Lagomarsino was an Italian seaman whose presence in the United States was the result of conditions arising out of World War II. The Attorney General refused to legalize Lagomarsino's residence through preexamination proceedings even though he was married to an American citizen." (180 F. 2(d) 1004.) The *Lagomarsino* case is set forth in the record and annexed to the Court of Appeals opinion at 180 F. 2(d) 1006. As the record will show in the *Lagomarsino* case the Attorney General reversed the Board of Immigration Appeals without assigning any reason for his decision, contrary to 8 C.F.R. 90.12 (180 F. 2(d) 1003, 1010).

On July 1, 1948, Congress enacted Public Law 863 (62 Stat. 1206) amending Section 19c of the Immigration Act of February 5, 1917 (8 U.S.C.155c) to authorize the suspension of deportation in the cases of aliens without American family ties who had seven years residence in the United States. (See House Report 647 and Senate Reports 1201 and 1204, 80th Congress). Thereafter the petitioner applied for discretionary relief under this statute. It will be noted that the statute was enacted subsequent to the date of the Attorney General's decision in the *Lagomarsino* case which was rendered on February 8, 1946. Nevertheless, on December 3, 1948, the Board of Immigration Appeals denied relief to the petitioner under Public Law 863 on the basis of the *Lagomarsino* case with the following statement (180 F. 2(d) 1006):

"The case is one squarely within the terms of the decision of the Attorney General in the *Lagomarsino* case (supra) and accordingly he cannot be granted the privilege of applying for suspension of deportation. The motion must therefore be denied."

Thereafter, on May 4, 1949 petitioner filed a writ of habeas corpus. On appeal to the Circuit Court of Appeals, the court speaking through Judge Frank said:

"However since in Lagomarsino he overruled the Board and thus agreed with the Commissioner, it seems clear that the Attorney General was acting in accordance with the 'policy' of refusing to consider whether or not to give discretionary relief of preexamination to any persons coming within a fixed category, i.e., those whose presence in the United States is due solely to the war. It is also clear that the Board felt constrained by the Lagomarsino decision to apply the 'policy' based on this classification to Mastropasqua's requests for, first, preexamination, and later suspension of deportation. No justification of this classification is in the record of either the present case or in Matter of Lagomarsino. Nor can we discern any. There seems no more rationality in this classification than there would be in arbitrarily refusing to consider discretionary relief for all lefthanded men or for all whose names begin with the first thirteen letters of the alphabet. Consequently we conclude that the classification is capricious."

The Circuit Court remanded the case with directions to the Immigration Service to exercise discretion one way or another. On September 14, 1950, the Board of Immigration Appeals rendered a decision which is annexed hereto as Exhibit A in which it again denied relief on the basis of the *Lagomarsino* case. It stated:[1]

"We hold it would be arbitrary and capricious on our part to grant to this alien that which has been

[1] Preexamination was again denied because of the oversubcription of the Italian quota which is no longer oversubscribed today.

> denied to many, many other aliens in like circumstances where action has been taken under the *Lagomarsino* ruling of the Attorney General."

The Board thereupon again directed deportation.

This ruling was called to the attention of the District Court which again dismissed the writ of habeas corpus on November 4, 1950 and upon appeal to the Circuit Court of Appeals composed of Judges Augustus Hand, Chase and Clark, the dismissal of the writ was affirmed without opinion on February 15, 1951.

Reasons For Granting the Writ

As the opinions of the Board of Immigration Appeals indicate, hundreds of aliens were caught in the United States during the War. These aliens were unable to return to their native lands, first because, like petitioner, they then were recent arrivals of enemy nationality and were therefore detained in the United States by our government, and second, because they were unable to secure transportation. These individuals became acquainted during this period with the American way of life. They learned to speak English and established themselves here. When the shooting war was over, they naturally desired to remain here. Congress recognized the injustice of making these people return to their native land and enacted a statute granting the Attorney General authority to legalize the status of these individuals even though they had no American families, provided they were persons of good moral character and had a residence of 7 years. That petitioner is a person of good moral character and has 7 years residence is undisputed. In requesting the enactment of this statute, the Attorney General himself remarked that he was in a better position to judge the character of these

individuals who had been in the United States and subject to observation than newly-arrived immigrants.[2] However, prior to the enactment of this statute, the Attorney General in violation of his own regulations had issued a decision refusing to exercise discretionary relief for any alien who was caught here by reason of World War II. So drastic was this ruling that he even refused to exercise such discretion in the case of a man named *Lagomarsino* who had an American citizen wife dependent upon him for support. The problem presented by the instant case will affect the decisions in many hundreds of cases, as noted by the Board of Immigration Appeals. (See Appendix A). There have been frequent recent occasions in which the Attorney General has either refused to exercise discretion or has exercised discretion capriciously under our immigration laws. See: *Carlson* v. *Landon,* 186 F. 2(d) 183; *Mangaoang* v. *Boyd,* 186 F. 2(d) 191.

It is respectfully submitted that this is an issue involving an important question of federal law which has not been but should be settled by the Supreme Court—that is, whether or not the refusal to exercise discretion on the part of the Attorney General pursuant to a policy issued in violation of his own regulations offends due process and should be subject to review. Also at issue is whether such policy can continue to prevent the exercise of discretion after Congress has amended the law to authorize discretionary relief in the very cases where the Attorney General has refused such action.

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[2] House Immigration Hearings on H.R. 2933, 80th Congress.

ARGUMENT

Point I

The Attorney General's Policy Was Issued In Violation of 8 C.F.R. 90.12 And Is Therefore Invalid.

Section 90.12 as it existed on February 8, 1946, when the *Lagomarsino* decision was promulgated required that wherever the Attorney General reversed the Board of Immigration Appeals, he had to set forth his reasons in writing. As noted both by the majority and dissenting opinion in the instant case, 180 F. 2(d) 1003, 1010, the Attorney General gave no reason whatsoever. A decision by the Attorney General issued in violation of his own regulations is invalid. *Bridges* v. *Wixon,* 326 U.S. 135.

It is submitted that deportation on this record, founded as it is upon an invalid ruling of the Attorney General offends due process and should be set aside. See *Bridges* v. *Wixon, supra,* and *Sung* v. *McGrath,* 339 U.S. 33.

Point II

The Deportation Order Herein Was Invalid Because the Attorney General Refused to Exercise His Discretion.

It is clear that in each of the three opinions rendered by the Board of Immigration Appeals, acting for the Attorney General, the Board was motivated by the *Lagomarsino* case. In the two opinions annexed to the Court of Appeals decision and in the final decision which is annexed hereto as Appendix A, the Board of Immigration Appeals stressed the fact that it was bound by the *Lagomarsino* case. In its final opinion the Board of Immigration Appeals frankly acknowledged that this case was in the *Lagomarsino* category and that it would be unfair to others similarly situated

to grant favorable relief in the instant case. But this overlooks the fact that the *Lagomarsino* case was improperly decided and that it was decided prior to Public Law 863 (62 Stat. 1206) granting the Attorney General authority to legalize the status of those aliens who were in the United States 7 years. Congress made no discrimination against the aliens who were caught here and remained here by reason of World War II. On the contrary it required that an alien have 7 years residence and that he be here on July 1, 1948. This necessarily requires that the alien be in the United States during the war years.

In its opinion the Court of Appeals said:

> "(2) Courts have no power to review administrative discretion when it is reasonably exercised. United States ex rel. Weddeke v. Watkins, 2 Cir., 166 F. 2d 369, 373, certiorari denied, 333 U.S. 876, 68 S. Ct. 904, 92 L. Ed. 1152. But in appropriate circumstances, they can compel correction of an abuse of discretion or can compel an official to exercise his discretion where he has obviously failed or refused to do so. Such an obvious refusal occurs, we think, when an official sets up a class of cases as to which he refuses ever to exercise any discretion, one way or the other, if that class is not rationally differentiated from other cases, not within that class, where he uses his discretion case by case. Thus, where a trial judge refused to pass upon petitions for naturalization 'because of a policy . . . not to grant citizenship during the war' to a certain class of persons, it was held that the upper court could direct him to exercise his discretion. Schwab v. Coleman, 4 Cir., 145 F. 2d 672. This same doctrine has often been applied to officials who are not judges. See, e.g., the statement in Wilbur v. United States, 281 U.S. 206, 218, 50 S. Ct. 320, 74 L. Ed. 809.
>
> "(3) The Board here has held that the discretionary power delegated to it by the Attorney General cannot be exercised to allow Mastrapasqua either preexamination or suspension of deportation. The sole

> ground given has been that Mastrapasqua is a member of a class to which the Attorney General has decided that, as a matter of policy, such discretionary relief shall not be accorded. For here, the Board, in denying these two types of relief to Mastrapasqua, has twice held that it was bound by the decision of the Attorney General in Matter of Lagomarsino, No. A-5955999. . ."

Nevertheless when the case was remanded to the Board of Immigration Appeals, for a third consideration, it referred again to the *Lagomarsino* case and considered itself bound thereby. (Appendix A). It is true that it indicated that it was not only giving weight to the *Lagomarsino* case but also to the additional factors that the petitioner had no family ties in the United States and that he had remained here after being ordered to leave the United States. But Congress, in enacting the statute, specifically waived the requirement of family ties for those who had seven years residence. Nor should petitioner be penalized because of refusal to leave the United States where the order directing his voluntary departure without deportation was based upon the denial of permanent adjustment of his status pursuant to the invalid *Lagomarsino* policy of the Attorney General.

In this connection, the instant case falls within the ruling of the Supreme Court in *Bridges v. Wixon*, 326 U.S. 135, where the majority of the Court said:

> "In these habeas corpus proceedings the alien does not prove he had an unfair hearing merely by proving the decision to be wrong (Tisi v. Tod, 264 U.S. 131, 144) or by showing that incompetent evidence was admitted and considered. Vajtauer v. Commissioner, supra, p. 106. But the case is different where evidence was improperly received and where but for that evidence it is wholly speculative whether the requisite finding would have been made."

It is wholly speculative whether the Board of Immigration Appeals would have refused to exercise discretionary relief herein were it to have been uninfluenced by the *Lagomarsino* case.

It is clear, then, that the *Lagomarsino* principle—a principle of arbitrary and invalid refusal to exercise discretion—pervaded each and every administrative consideration of this case. Capricious administrative action or inaction of this character is reviewable under the Administrative Procedure Act, 5 U.S.C. 1009(e). See also *Carlson v. Landon, supra; Mangaong* v. *Boyd, supra; Schwab* v. *Coleman,* 145 F. 2(d) 672.

There has therefore been no compliance with the mandate of the Circuit Court as expressed in 180 F. 2(d) 999.

It is submitted that this is not a case in which discretion has been exercised or properly exercised. On the contrary it is one where the exercise of discretion has been refused or capriciously exercised. Under these circumstances the deportation order entered herein should not be permitted to stand.

Conclusion

Deportation is a drastic measure and is often the equivalent of banishment or exile. Is it too much to expect that in such proceedings our administrative authorities exercise their discretion freely and untrammelled by policy considerations which Congress did not authorize them to utilize? This improper administration of the immigration laws becomes more apparent when it is realized that the policy consideration was adopted by the Attorney General *prior* to the enactment of the statute under which discretion is here sought. If this be called the exercise of discretion, if this type of practice on the part of the Attorney General be permitted without review by the Supreme Court, then

administrative caprice will be freely substituted without limitation for administrative discretion, and the Attorney General will be authorized to disregard his own regulations, which have the force and effect of law.

Respectfully submitted,

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CHARLES GRAFF,
Of Counsel.

APPENDIX A

File: A-5587208.

In re: Francesco Mastropasqua in Deportation Proceedings.

In Behalf of Respondent: Charles Graff, Esquire, 154 Nassau Street, New York, New York. Heard: September 7, 1950.

Charges: Warrant: Act of 1924—Remained longer.

Lodged: None.

This case is now before the Board on an appeal from the decision of the Acting Assistant Commissioner denying this alien's application for preexamination or suspension of deportation. In argument before the Board, counsel for the alien asked for suspension of deportation. This case basically is simple and is similar to many hundreds of cases in the past considered by this Board. Through succession of motions and various proceedings a rather voluminous record has been created. The alien is an Italian, who arrived at the port of Boston, Massachusetts, on June 7, 1940 as a member of the crew of the Italian SS "Dino." Under the regulations then in effect, he had 60 days within which to leave. He did not leave within the 60-day period and thereby became subject to deportation.

On May 31, 1941 for security reasons the alien was removed from the SS "Dino" and was interned until June 17, 1943. He was then paroled and was at large until taken into custody for deportation. Although an order of deportation was entered on May 23, 1941, it was later withdrawn and the alien was given the privilege of voluntary departure without preexamination. The denial of preexamination was based on the ruling of the Attorney General in the *Matter of Lagomarsino,* A-5955999 (February 8, 1936). The Commissioner's order points out the various periods granting the alien time within which to depart voluntarily and his failure to abide by the provisions of these orders. After Section 19(c) of the Immigration Act

of 1917 was amended by the Act of July 1, 1948, making seven years' residence in the United States a basis for suspension of deportation in the discretion of the Attorney General, an application was made for suspension of deportation and was denied on the basis of the *Lagomarsino* ruling.

Failing to leave the country the order of deportation was reinstated. Habeas corpus proceedings were later instituted. The District Court dismissed the writ. On appeal the Circuit Court of Appeals for the Second Circuit remanded the case "with directions to the district court to order appellant released from custody unless, within a reasonable time to be determined by the district court, the Immigration and Naturalization Service exercises discretion, one way or another, with respect to Mastrapasqua upon his application for pre-examination or suspension of deportation." This ruling of the court was based on the holding that the Attorney General's policy laid down in the *Lagomarsino* case was an improper use of discretion. The *Lagomarsino* case held in effect that preexamination or suspension to legalize residence in the United States would be denied aliens whose presence in the United States was the result of circumstances arising out of the late war. The ruling was, however, later modified to permit of suspension of deportation or preexamination where the alien had a citizen or legally resident alien wife or minor children. In commenting on this classification the court stated:

> "No justification of this classification is in the record of either the present case or in Matter of Lagomarsino. Nor can we discern any. There seems no more rationality in this classification than there would be in arbitrarily refusing to consider discretionary relief for all left-handed men or for all whose names begin with the first thirteen letters of the alphabet. Accordingly, we conclude that the classification is capricious."

In the *Matter of Westerhausen*, file A-5908014, decided May 31, 1950 (copy of decision attached for ready reference), we discussed the reasoning which prompted the adoption of the Lagomarsino rule.

As a basic premise in considering discretionary action, we hold we are obligated morally, if not legally, to treat

alike all aliens in like circumstances. This obviously requires the formation of certain standards or categories as a guide to the grant of discretion. We do not understand that the ruling of the Second Circuit is to the contrary. We believe the holding to be that, as the court viewed it, the *Lagomarsino* ruling was unsupported by reason and therefore capricious. In the *Westerhausen* case, we have given the reasons which prompted the *Lagomarsino* policy and of which apparently the court was unaware. We hold it would be arbitrary and capricious on our part to grant to this alien that which has been denied to many, many other aliens in like circumstances where action has been taken under the *Lagomarsino* ruling of the Attorney General.

In addition to this reason, the alien has his wife and four children in Italy. The immigration laws favor uniting families—not separating them; and, therefore, we do not believe this case has appropriate appeal for suspension of deportation.

We also hold that as this alien acquired seven years' residence in the United States by failure to leave the United States voluntarily after requesting such privilege and through counsel's giving assurances he would so leave (See Board order of November 15, 1945), he should not be granted suspension of deportation. It is our holding that residence acquired under such circumstances ought not to be applauded by the grant of suspension of deportation.

Counsel admits that preexamination is not in order as a quota number is not readily available. His argument to us was limited solely to the proposition that the alien ought to be granted suspension of deportation.

For the above reasons, we affirm the order of the Commissioner.

Order: It is ordered that the appeal be dismissed.

——— ———,

Chairman.

TCF/jr.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 629

FRANCESCO MASTRAPASQUA, PETITIONER

v.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the Court of Appeals affirming in open court the District Court's order noting compliance with its mandate (R. 47) is reported at 186 F. 2d 717. The prior opinion of the Court of Appeals remanding the cause with directions to release petitioner from custody unless the Immigration and Naturalization Service exercised its administrative discretion with respect to his appli-

cation for relief (R. 12-31) is reported at 180 F. 2d 999. The order of the District Court noting compliance with its mandate (R. 38-39) and the prior opinion of the District Court dismissing the writ of habeas corpus (R. 7) are not reported.

JURISDICTION

The judgment of the Court of Appeals (R. 48) was entered on February 15, 1951. The petition for a writ of certiorari was filed on March 22, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Attorney General, through the Immigration and Naturalization Service, in acting upon petitioner's application for suspension of his deportation, exercised his administrative discretion, in compliance with the mandate of the court below.

STATUTE AND REGULATIONS INVOLVED

Section 19, Immigration Act of 1917, 39 Stat. 889, as amended, 54 Stat. 672 (June 28, 1940), 56 Stat. 1044 (December 8, 1942) and 62 Stat. 1206 (July 1, 1948), 8 U.S.C., Supp. III, 155(c) provides in pertinent part as follows:

> (c) In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of

his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act.[1] If the deportation of any alien is suspended under the provisions of this subsection for more than six months, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. These reports shall be submitted on the 1st and 15th day of each calendar month in which Congress is in session. If during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If prior to the close of the session of the Congress next following the ses-

[1] This clause enlarging the class of aliens eligible for this relief, and the succeeding provisions changing the procedure for congressional confirmation of the action of the Attorney General granting such relief has been effected by an amendment of this statute on July 1, 1948.

> sion at which a case is reported, the Congress does not pass such a concurrent resolution, the Attorney General shall thereupon deport such alien in the manner provided by law. * * *

Section 10(a), (e), Administrative Procedure Act of 1946, 60 Stat. 243, 5 U.S.C. 1009 (a), (e), provides as follows:

> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> (a) Right of Review.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.
>
> * * * * *
>
> (e) Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of

statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Section 90.12, 8 C.F.R. (1945 Supp.), in effect in 1946, read as follows:

§90.12 *Board of Immigration Appeals; reference of cases to the Attorney General.* In any case in which a dissent has been recorded; in any case in which the Board shall certify that a question of difficulty is involved, or in any case in which the Attorney General so directs, the Board of Immigration Appeals shall refer the case to the Attorney General for review of the Board's decision. In any case in which the Attorney General shall reverse the decision of the Board, the Attorney General will state in writing his conclusions and the reasons for his decision.

Section 90.12, 8 C.F.R. (1949 ed.) provides:

Board of Immigration Appeals; reference of cases to the Attorney General. The Board

of Immigration Appeals shall refer to the Attorney General for review of the Board's decision all cases which:

(a) The Attorney General directs the Board to refer to him.

(b) The chairman or a majority of the Board believes should be referred to the Attorney General for review of its decision.

(c) The Commissioner requests be referred to the Attorney General by the Board and it agrees.

In any case in which the Attorney General shall review the decision of the Board, his decision shall be stated in writing and shall be transmitted to the party against whom the order is effective or to his counsel or representative, as provided in § 90.11(a).

Section 142.1, 8 C.F.R. (1949 ed.) provides:

Who may apply. An alien who is a member of any of the following classes and who intends to apply to a consular officer of the United States in Canada for an immigration visa for entry into the United States for permanent residence may, subject to the provisions of this part, apply for the privilege of a preexamination by officers of the Immigration and Naturalization Service for the purpose of determining in advance his admissibility into the United States for permanent residence when in possession of an unexpired immigration visa:

(a) An alien—other than a citizen of Canada, Mexico, or any of the islands adjacent to the United States—who has been within the United States for a period of one year or more and who has a spouse, parent, or minor child, who is in the United States and is a citizen thereof or is a lawfully permanent resident alien;

(b) An alien—other than a citizen of Canada, Mexico, or any of the islands adjacent to the United States—who has resided in the United States for a period of five years or more; or

(c) An alien—other than a citizen of Canada—whose case is found to be an exceptionally meritorious case.

Section 142.2, 8 C.F.R. (1949 ed.) provides:

Aliens eligible. Preexamination shall not be authorized unless it appears to the officer granting such authorization that the alien is:

(a) Admissible to Canada;

(b) Of good moral character;

(c) Registered and/or fingerprinted as required by the Alien Registration Act, 1940; and

(d) Able to obtain the prompt issuance of an immigration visa in case it is determined that he is admissible to the United States for permanent residence.

* * * * *

Section 142.4, 8 C.F.R. (1949 ed.) provides:

Application; where deportation proceedings

have been instituted. Where the applicant is the subject of deportation proceedings, the application shall be filed as provided in § 150.6(g) of this chapter.

* * * * *

Section 150.6(g), 8 C.F.R. (1949 ed.) provides in pertinent part as follows:

Application for suspension of deportation, for departure in lieu of deportation, or for preexamination. At any time during the hearing the alien may apply, under the provisions of section 19(c) of the Immigration Act of 1917, as amended (39 Stat. 889, 54 Stat. 671, 56 Stat. 1044; 8 U.S.C. 155(c)):

(1) * * * for suspension of deportation; or

(2) * * * for the privilege of departing the United States at his own expense in lieu of deportation; or

(3) * * * for the privilege of departing the United States at his own expense in lieu of deportation and the privilege of preexamination under Part 142 of this chapter. The alien may apply simultaneously for more than one of these three reliefs. The alien shall be warned that any statements made by him in such applications may be considered as evidence in any proceedings to determine his right to enter, reenter, pass through, or reside in the United States, and that false answers to any of the questions in such applications may bar him from the relief which he requests. Any such applications shall then be introduced into evidence and made a part of the record.

STATEMENT

Petitioner, a native citizen of Italy, arrived at Boston, Massachusetts, on June 7, 1940, as a member of the crew of the Italian vessel S.S. Dino (R. 20, 22). Subsequent to the entry of Italy into World War II, the ship remained in port and he stayed aboard until March 30, 1941, when the Coast Guard, acting pursuant to a security program to prevent the sabotage of Italian vessels interned in our ports, removed petitioner from the ship (R. 20, 24). On March 31, 1941, a warrant for petitioner's arrest was issued, charging him with overstaying the statutory twenty-nine days' visit allowed to foreign seamen (R. 7, 21). A hearing was held, and, on May 23, 1941, the Board of Immigration Appeals ordered petitioner deported to Italy (R. 7, 22). A deportation warrant issued the same day, but the war prevented the enforcement of the order (R. 7, 12, 21). Following our entry into the war, petitioner, along with other Italian seamen, was interned at Fort Missoula, Montana, from whence he was paroled in March 1944 (R. 21, 24).

Since his parole, petitioner has assiduously endeavored to avoid deportation (R. 7, 12-13, 21-24). On a number of occasions, the immigration authorities suspended the warrant of deportation to allow petitioner to depart voluntarily,[2] but each time

[2] The trial court found that the following administrative dispositions were made in this matter: "November 15, 1945 (the war intervening) Board denied application to reopen

petitioner failed to depart. Finally, in March, 1948, after petitioner had failed to comply with an order of December 12, 1947, granting him the privilege of voluntary departure within 60 days, the order of deportation of May 23, 1941, was reinstated and petitioner was arrested. He has since been held at Ellis Island (R. 7, 13, 23).

Petitioner tried to have the execution of the deportation order deferred (R. 23). After that was denied, he moved for reconsideration of the order of December 12, 1947, and asked, in addition, for the privilege of pre-examination (R. 13, 20, 23).[3] In its opinion denying the motion, the Board stated that petitioner was not eligible for such relief since, in a previous case entitled *Matter of Lagomarsino,* decided February 8, 1946, the Attorney General had adopted a general policy requiring all aliens who were in this country because of conditions arising out of the war to be returned to their native country. The Attorney General had so ruled despite the fact that Lagomarsino was mar-

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case and request for pre-examination; but directed warrant withdrawn and required alien to leave country in sixty days; September 25, 1946 Commissioner denied application to reopen proceedings; Board of Appeals affirmed October 3, 1946; May 9, 1947 relator's time within which to leave country without order of deportation extended 30 days; September 29, 1947 Commissioner denied application for extension of time to depart and ordered deportation to Italy; and warrant issued; December 12, 1947 Board granted another 60 days to effect departure and upon failure to do so that he be deported to Italy; * * *" (R. 7).

[3] The procedure for pre-examination is described in the prior opinion of the Court of Appeals (R. 13-14, see *supra,* p. 2).

ried to an American citizen dependent on him for support.[4] The Board noted that petitioner's case was different from the *Lagomarsino* case in that petitioner's wife and four children resided in Italy. (R. 21.)

While petitioner's application was pending, Section 19 of the Immigration Act (8 U.S.C. 155(c)) was amended to provide that the Attorney General may suspend deportation of an alien who "has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act" (62 Stat. 1206, effective July 1, 1948, *supra,* p. 2). In October 1948, petitioner sought the discretionary relief of suspension of deportation under this statute. The Board denied the relief, again stating that, under the *Lagomarsino* case, petitioner could not be granted such privilege (R. 22-24).

Thereafter petitioner obtained a writ of habeas corpus from the District Court for the Southern District of New York. In his petition he alleged that the denial of his application for discretionary relief was a capricious abuse of discretion (R. 4). The District Court dismissed the writ and petitioner appealed (R. 8, 9).

The Court of Appeals, by a divided court, held that, since the Attorney General had by his ruling in the *Lagomarsino* case established a "policy" of

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[4] See R. 24-30 for the Board's opinion and Attorney General's action in the *Lagomarsino* case.

refusing to consider whether or not to give discretionary relief of pre-examination or suspension of deportation to those whose presence in the United States was due solely to conditions arising from World War II, he thereby, in effect, arbitrarily set up a class of aliens who could never be considered for such relief. The majority opinion (R. 20), however, cautioned that, "We are not to be taken as saying that the Attorney General may not be able to supply a rational explanation of his classification, but merely that, as matters now stand, we perceive none." It held that, in following that classification in petitioner's case, the Board was not exercising its discretion, but was refusing to exercise discretion because petitioner fell into the arbitrarily established class. The Court of Appeals therefore reversed and remanded the cause with directions that petitioner be "released from custody unless, within a reasonable time to be determined by the district court, the Immigration and Naturalization Service exercises discretion, one way or another, with respect to Mastrapasqua upon his application for pre-examination or suspension of deportation" (R. 19-20).

In compliance with the order of the trial court entered on the mandate (R. 35-37), the Acting Assistant Commissioner of Immigration and Naturalization fully reconsidered petitioner's application for discretionary relief. On July 10, 1950, he denied it on the merits, setting forth the reason for such action as follows (R. 39):

> In the instant case the respondent was removed from the vessel upon which he arrived for security reasons. He was interned as a dangerous enemy alien. His wife and children reside in his native country. He managed to remain in this country after the war only because of the forebearance of the Government in not proceeding with his deportation while he had a compensation claim pending and because he was later afforded an opportunity to depart voluntarily. He refused to leave when he had that opportunity and his case does not merit further exercise of administrative discretion.

On September 14, 1950, the Board of Immigration Appeals affirmed the denial of discretionary relief (R. 40; Pet. 15-17). In its opinion, which is printed as an appendix to the petition for certiorari (Pet. 15-17), the Board stated that, subsequent to the decision by the Court of Appeals for the Second Circuit on petitioner's appeal, it had set forth, in a decision entitled *Matter of Westerhausen,* the reasons underlying the general classification of the *Lagomarsino* rule and had thus met the objections raised by the Court of Appeals (Pet. 16-17). The opinion further stated:

> In addition to this reason, the alien has his wife and four children in Italy. The immigration laws favor uniting families—not separating them; and, therefore, we do not believe this case has appropriate appeal for suspension of deportation.

> We also hold that as this alien acquired seven years' residence in the United States by failure to leave the United States voluntarily after requesting such privilege and through counsel's giving assurances he would so leave (See Board order of November 15, 1945), he should not be granted suspension of deportation. It is our holding that residence acquired under such circumstances ought not to be applauded by the grant of suspension of deportation.

Thereafter, respondent moved (R. 39-41) the trial court for an order dismissing the writ of habeas corpus on the ground that he had complied with the order entered on the mandate of the court below. The trial court granted the order dismissing the writ (R. 38-39), and petitioner appealed (R. 45). The court below affirmed in open court (R. 47).

ARGUMENT

The petition seeks review of the last order of the court below, which summarily affirmed the trial court's order dismissing the writ of habeas corpus on the ground that the Board of Immigration Appeals had complied with the mandate to exercise administrative discretion, "one way or another", with respect to petitioner's application for the discretionary relief of pre-examination[5] and suspen-

[5] Petitioner seems to have abandoned his application for pre-examination. Upon review of the Commissioner's ruling, with respect to petitioner's application for suspension of deportation after a reconsideration of the case following the

sion of deportation. Thus, the sole question sought to be reviewed here is whether the Immigration and Naturalization Service did in fact, as both courts have held it did, exercise administrative discretion in its latest ruling denying petitioner's application.

Petitioner contends (Pet. 2, 8-14) that the final opinion of the Board of Immigration Appeals is still based on the *Lagomarsino* ruling, and therefore does not represent the exercise of administrative discretion required under the mandate of the Court of Appeals. That court found so little merit in the argument that it affirmed in open court the district court's order noting compliance with its mandate. We submit that such ruling was clearly correct.

The Board of Immigration Appeals undertook to explain the *Lagomarsino* classification by referring to its decision in *Matter of Westerhausen* in which it set forth the reasons for the general policy adopted in the *Lagomarsino* case and similar cases involving aliens in this country because of war conditions (Pet. 16-17). That reasoning supplies the "rational explanation" for the general policy which the Court of Appeals found lacking on petitioner's prior appeal and shows that the general

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mandate of the lower court, the Board stated (Pet. 17): "Counsel admits that preexamination is not in order as a quota number is not readily available. His argument to us was limited solely to the proposition that the alien ought to be granted suspension of deportation."

policy is itself a valid exercise of administrative discretion.

At all events, the subsequent portion of the final opinion of the Board of Immigration Appeals shows that its ruling affirming the denial of relief in this case was based, not on the general rule, but on the facts relating specifically to petitioner as an individual. The Board assigned two reasons for its action—(1) that petitioner had a wife and four children in Italy; (2) that he had acquired seven years' residence in the United States only because he failed to leave voluntarily after requesting such privilege and after counsel had given assurances he would leave (Pet. 17, see Statement, *supra,* p. 13). Manifestly, therefore, the Board did consider petitioner's individual circumstances and denied him relief as a matter of administrative discretion.[6]

It is established that the power vested in the Attorney General or his delegate, the Commis-

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[6] Petitioner's argument addressed to the alleged invalidity of the *Lagomarsino* decision because the Attorney General did not set forth in writing his reasons for reversing the Board of Immigration Appeals (Pet. 10) is thus irrelevant. The Board was not relying on the *Lagomarsino* ruling as controlling its action; it was affirming and explaining its general policy.

Petitioner also challenges the basis of the Board's action by arguing that under the 1948 amendment, American family ties are not a prerequisite to relief (Pet. 12). Manifestly, however, the existence of family ties in the native country is a factor which may properly be considered in determining whether to grant discretionary relief. Petitioner also argues (Pet. 12) that he should not be penalized for his refusal to leave where the order directing voluntary departure was granted because of the invalid *Lagomarsino* ruling. Petitioner, however, first agreed to leave voluntarily in 1945, prior to the *Lagomarsino* decision (Pet. 17, R. 40-41, 30).

sioner of Immigration and Naturalization, under Section 155 (c), to suspend a deportation order is discretionary and not subject to review by the courts, provided, of course, it is not exercised in an arbitrary or capricious manner. *United States ex rel. Kaloudis* v. *Shaughnessy,* 180 F. 2d 489 (C. A. 2); *United States ex rel. Walther* v. *District Director of Immigration and Naturalization,* 175 F. 2d 693 (C. A. 2); *United States ex rel. Weddeke* v. *Watkins,* 166 F. 2d 369 (C. A. 2), certiorari denied, 333 U. S. 876; *United States ex rel. Vassiliades* v. *Commissioner of Immigration and Naturalization,* 103 F. 2d 423 (C. A. 2); *Kavadias* v. *Cross,* 82 F. Supp. 716 (N. D. Ind.); *United States ex rel. Zabadlija* v. *Garfinkel,* 77 F. Supp. 751 (W. D. Pa.), affirmed, 173 F. 2d 222 (C. A. 3). The action here is not arbitrary or capricious. Petitioner seems to assume that because he can qualify for suspension of deportation under the 1948 amendment to Section 155 (c), the Attorney General must grant him such relief. The statute, however, states that the Attorney General may grant such relief, not that he must do so. Ordinarily, to obtain favorable action in matters of this nature more is required than mere showing of a *modicum* of statutory compliance. The statutory requirements must be surrounded by meritorious circumstances. See *United States ex rel. Adel* v. *Shaughnessy,* 183 F. 2d 371 (C. A. 2). Indeed, the legislative history relating to the amendment of the statute indicates that members of the subcommittee of the House Judiciary Committee

were endeavoring to limit the effect of the bill to a group of aliens who at that time were ineligible for suspension of deportation but whose cases were considered to be unusually meritorious. See Sub-Committee Hearings,[7] House Jud. Com., on H. R. 2933, 80th Cong., 1st sess., pp. 129-133.

In this case, the Attorney General, through the Commissioner of Immigration and the Board of Immigration Appeals, considered all the circumstances in petitioner's case, and assigned several patently reasonable grounds for finding it unmeritorious. Such action was a valid exercise of administrative discretion and there is no basis for judicial reversal.

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[7] Thus, by the amendment Congress, though actually expanding the class of deportable aliens who may apply for the privilege of suspension of deportation, in effect, tightened its control over the discretionary power of the Attorney General in these matters by requiring congressional confirmation of his action in cases in which suspension in excess of six months is granted. It felt that the Attorney General was granting discretionary relief in too many cases, which automatically received congressional affirmance under the former statute simply because of inaction on the part of Congress. This was the reason for providing for affirmative congressional action. See S. Rep. 1204, 80th Cong., 2d sess., pp. 3-4.

CONCLUSION

The judgment below is correct, and the petition for certiorari presents no question requiring further review by this Court. It is respectfully submitted that the petition should be denied.

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